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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 435

JOHN F. MULCAHEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER,

vs.

GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1956

CERTIORARI GRANTED NOVEMBER 19, 1956

SUPREME COURT OF THE UNITED STATES

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1 [File endorsement omitted]

Appendix to Appellee's Brief—Filed March 15, 1956

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PETITION FOR WRIT OF HABEAS CORPUS—Filed November 10, 1954

To the Honorable, the Judges of the United States District Court, for the Eastern District of Michigan:

Your petitioner, Guiseppe Catalanotte, alleges that he is unlawfully imprisoned and detained by James W. Butterfield, District Director of Immigration and Naturalization, in the Wayne County Jail, and such other places of detention as are provided for immigration prisoners in the City of Detroit, County of Wayne, State of Michigan, and under bail and by virtue of a pretended writ or warrant issued by the District Director of Immigration and Naturalization at Detroit, Michigan. His imprisonment and detention are unlawful in that:

1. Petitioner entered the United States for permanent residence September 11, 1920, and has continued to reside in the United States since that time without any absence therefrom.

2. Petitioner is married to a citizen of the United States and has two children who are citizens of the United States by virtue of birth in the United States.

3. Petitioner has fully complied with all the requirements upon him and has exhausted his remedy by appealing to the Board of Immigration Appeals and the Attorney General of the United States.

4. Petitioner has not been accorded a full and fair hearing as required by law.

5. The order for deportation of petitioner constitutes an abuse of discretion.

6. The order for deportation is based upon misapplication of law.

2 7. The decision adopts an erroneous conclusion of law.

Wherefore, your petitioner prays that a writ of Habeas Corpus issue out of this court to James W. Butterfield, District Director of Immigration and Naturalization, Detroit, Michigan, commanding him forthwith to have the body of this petitioner before the Court, together with the cause of his detention and to abide the further order of the Court herein.

Guiseppe Catalanotte, Petitioner.

Dated: November 1st, 1954.

Duly sworn to by Guiseppe Catalanotte. Jurat omitted in printing.

Let a writ issue as prayed for in the foregoing petition.
Arthur F. Lederle, United States District Judge.

November 1, 1954.

 In United States District Court

Exhibit "A"

3770 East Jefferson Ave.
Detroit 7, Mich.

E-051721 DEP

November 2, 1954

Mr. Joseph S. Hertogs
580 Washington Street
San Francisco, California

Dear Sir:

Re: Guiseppe Catalanotte

In accordance with the conditions of bond executed by you on January 6, 1954, in behalf of the above-named subject, you are hereby directed to deliver him in complete readiness for deportation to Italy at the Office of the District Director, Immigration and Naturalization Service, 3770 East Jefferson Avenue, Detroit, Michigan, no later

than 10:00 A. M., Friday, November 12, 1954. Transportation arrangements have been completed for Mr. Catalanotte to leave New York on November 16, 1954 aboard the SS "Conte Biancamano" sailing for Italy. Failure to deliver Mr. Catalanotte as directed will be followed by recommendation on the part of this office for forfeiture of bond.

Please cooperate with this Service and please be advised that when you deliver the subject to this office on November 12, 1954, he must be in possession of all his personal belongings and money due him from any source whatsoever.

4 Kindly acknowledge receipt of this letter on the copy hereto attached.

Very truly yours, Mr. James W. Butterfield, District Director, by: (S.) John T. Clingan, Acting Chief, Investigations, Detention and Deportation Section.

cc: Mr. Giuseppe Catalanotte,
c/o Mrs. Angela Baker,
20291 Lockmoor Dr.,
Harper Woods, Michigan.

Encl.

Registered Airmail

Return Receipt Requested

cc: Mr. Louis M. Hopping,
Attorney at Law,
2256 Penobscot Building,
Detroit 26, Michigan.

IN UNITED STATES DISTRICT COURT

ANSWER AND RETURN TO PETITION FOR WRIT OF HABEAS CORPUS—Filed November 22, 1954

Now comes the respondent, James W. Butterfield, District Director, United States Immigration and Naturalization Service, Detroit, Michigan, by Fred W. Kaess, United States Attorney, and Dwight K. Hamborsky, Assistant

United States Attorney, and respectfully shows this Honorable Court that he,

1. Denies the allegation contained in the first paragraph of the petition that the petitioner is unlawfully imprisoned and detained. Respondent avers that the petitioner is lawfully held in the custody of the respondent in pursuance of a warrant of deportation issued by the respondent on November 2, 1954, at Detroit, Michigan, a copy of said warrant of deportation being attached hereto and made a part hereof.

2. Admits the allegation contained in paragraph 1 of the petition that the petitioner entered the United States for permanent residence on September 11, 1920, but the respondent is without knowledge or information sufficient to form a belief as to the truth of the averment that the petitioner has continued to reside in the United States since September 11, 1920, without any absence therefrom.

3. Neither admits nor denies the allegations contained in paragraph 2 of the petition but leaves the petitioner to his proofs.

4. Admits the allegations contained in paragraph 3 of the petition.

5. Denies each and every allegation contained in paragraph 4 of the petition.

6. Denies each and every allegation contained in paragraph 5 of the petition.

7. Denies each and every allegation contained in paragraph 6 of the petition.

8. Denies each and every allegation contained in paragraph 7 of the petition.

Wherefore, the respondent prays that the petition for writ of habeas corpus be denied and that a writ of habeas corpus not be issued.

Fred W. Kaess, United States Attorney, Dwight K. Hamborsky, Assistant U. S. Attorney, Attorneys for Respondent.

Dated: November 18, 1954.

ORDER DENYING WRIT OF HABEAS CORPUS—July 19, 1955

At a session of said Court held in the Federal Building, Detroit, Michigan, on July 19, A. D., 1955.

Present: Honorable Arthur F. Lederle, Chief Judge.

Petitioner herein having filed a petition for a writ of habeas corpus to issue against the Department of Immigration and Naturalization Service, and hearing having been held thereon on the dates of June 27, 1955 and July 18, 1955; and counsel for petitioner and respondent having filed briefs in connection therewith; and the Court having heard said arguments of counsel and having examined the file and the briefs filed in connection therewith, and,

It appearing from the study of all proceedings that the petitioner is not protected by any immunity on his 1925 conviction and that the Immigration and Naturalization Service is within its proper jurisdiction to order the deportation of this alien under the Immigration and Naturalization Laws of this country as promulgated by the Congress of the United States,

It is, therefore, ordered that petitioner Guiseppe Catalonotte's petition for a writ of habeas corpus, to issue against the Immigration and Naturalization Service, be and it hereby is denied and dismissed, for the reason that after a full and complete hearing petitioner has been unable to substantiate the allegations presented in his original petition.

Arthur F. Lederle, Chief Judge.

Clerk's Certificate to foregoing paper omitted in printing.

Appendix to Appellant's Brief

BEFORE THE BOARD OF IMMIGRATION APPEALS
United States Department of Justice
Immigration and Naturalization Service
Kansas City, Missouri

HEARING:

GIUSEPPE CATALANOTTE, Respondent

File: E 0 51 721

Date: June 9, 1953.

Place: United States Penitentiary, Leavenworth, Kansas.

Special Inquiry Officer: P. S. Willmore.

Examining Officer: Lloyd Rosander.

Stenographer: Catherine Dornblaser.

Special Inquiry Officer: This is a deportation hearing in the case of Giuseppe Catalanotte, under executed warrant of arrest and pursuant to a notice served upon him.

Special Inquiry Officer to Respondent:

Q. Do you speak and understand the English language?

A. I understand a little bit.

Q. In what language do you desire that this hearing be conducted?

A. I don't want no hearing now.

Q. Will you please state your name for this record.

A. I can't talk English good; I can't understand English good.

Q. What is your correct name?

A. My name,—you got it there.

Q. What is it?

A. Giuseppe Catalanotte.

Q. You are advised that at this hearing you have the right to be represented by counsel who may be an attorney at law or any other person authorized to practice in immigration and naturalization proceedings. Such represention must, however, be at your own expense. Do you wish to be so represented by counsel?

A. Yes.

Q. Have you made any provision for securing the services of an attorney at this time?

A. Why don't you write to my attorney?

Q. You are advised that this hearing will be continued

until 9:30 A. M., Friday, July 10, 1953. You are requested at that time to have an attorney present to represent you, should you desire. You are also advised that there will be no further continuance for this purpose. If you wish to be represented by an attorney, he must be present at that time. Do you understand?

A. Yes, sir.

9

"Q. Have you ever been charged with the violation of the Federal Narcotic Laws?

A. Yes.

Q. I show you a copy of an Indictment, Judgment and Commitment in Case No. 32918, United States of America vs. Guisseppe Catalonotte, and ask you whether this is a record of your conviction for violation of the narcotic laws?

A. Yes.

Q. Are you now serving sentence under that conviction?

A. Yes."

"Examining Officer to Special Inquiry Officer: I offer in evidence the Indictment, Judgment and Commitment in Case No. 32918, which has been exhibited to the respondent."

Counsel: I will object that it is immaterial in view of the recommendation accompanying this sentence that this conviction be not used as a ground for deportation against the respondent."

"Special Inquiry Officer: The above described Indictment, Judgment and Commitment will be entered into the record as *Exhibit No. 12*. Counsel's objection to the introduction of the document is therefore overruled."

"Q. In connection with your conviction for violation of the narcotic laws, was there a recommendation made by the Court that you not be deported as a result of such a conviction?

A. Yes.

Q. I show you a certified copy of a Criminal

10 Docket, Docket No. 32918, United States vs. Guisseppe Catalonotte, which bears a notation on the docket dated November 25, 1952, reading, "Sentence imposed is not to be used as a basis for deportation". Was it your understanding that such a recommendation was

made and entered into the criminal docket in connection with your conviction?

A. Yes, I understand that that sentence should not be used for deportation purposes."

"Examining Officer to Special Inquiry Officer: At this time I offer in evidence the certified copy of Criminal Docket in the case of the United States vs. Guisseppe Catalanotte, which has been identified by the respondent as relating to him."

"Special Inquiry Officer: The above described document will be entered into the record as *Exhibit No. 13*."

"Examining Officer to Respondent: As a result of your conviction for violation of the narcotic laws, at this time I will urge against you an additionall charge as to why you are subject to deportation from the United States. You appear to be subject to deportation under—

> Section 241(a)(11) of the Inimigration and Nationality Act in that you have been convicted of a violation of any law or regulation governing or controlling, the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein, to wit: Unlawful Purchase and Possession of Heroin (Violation of Sec. 2553(a), Title 26, U.S.C.A., and Sec. 174, Title 21, United States Code).

"Special Inquiry Officer to Respondent:

Q. The charge has just been lodged against you that under Section 241(a)(11) of the immigration and Nationality Act, you are subject to deportation for the reason that you have been convicted of a law relating to governing and controlling of narcotics, to wit: Title 26, U. S. C. A., Sec. 2553(a) and Title 21, United States Code, Sec. 174. Do you clearly understand the charge which has just been lodged against you?

A. I understand the charge.

"Special Inquiry Officer to Counsel: Do you desire any

further time for the purpose of preparing a defense against this additional charge?

"Counsel: No, we will not ask for additional time on account of that. I will introduce into the record a certified copy of the transcript of proceedings in the court showing that a recommendation was made by the judge at the time or within thirty days of the sentence referred to, that the respondent be not deported."

"Special Inquiry Officer: The above described certified copy of transcript of the court record described above will be entered into this record as *Exhibit No. 14.*

* * * * * * *

12 BEFORE THE BOARD OF IMMIGRATION APPEALS
United States Department of Justice
Immigration and Naturalization Service

DECISION OF THE SPECIAL INQUIRY OFFICER—August 20, 1954

File No.: E-051721—(Detroit).

In re: Guiseppe Catalanotte.

In Deportation Proceedings.

In Behalf of Respondent: Attorney Louis M. Hopping, 2256 Penobscot Building, Detroit 26, Michigan.

Charges:

Warrant: I. & N. Act—convicted of two crimes after entry, to wit: Receiving Stolen Property, and Malicious Threats to Extort.

Lodged: I. & N. Act—convicted of a violation of a law governing narcotics, to wit: Unlawful purchase and possession of heroin.

I. & N. Act—convicted of a violation of a law governing narcotics, to wit: Illegal traffic of narcotics.

Application: Suspension of deportation or voluntary departure.

Detention Status: Released on $2,000.00 bond.

Warrant of Arrest Served: May 5, 1953.

Discussion: The record relates to a 54 year old, married male, who is a native and citizen of Italy. His only entry into the United States was on September the 10th, 1920 at the port of New York, New York. He was admitted for permanent residence at that time as a "reservist." His

passage was paid by the Italian Government and Head Tax was waived. As the respondent had never resided in the United States prior to September 10, 1920, it is not believed that he was entitled to enter under Public
13 Resolution 44 of October 19, 1918, under which he was evidently admitted. He made application for certificate of lawful entry through registry proceedings, which application was denied on January 5, 1952 on the ground that he failed to establish good moral character.

The respondent was convicted in Recorder's Court, Detroit, Michigan on February 15, 1924 for the crime of Receiving Stolen Property, committed on January 26, 1923. As a result of the conviction he was sentenced to pay a fine of $500.00 or serve five months imprisonment. On May 27, 1954 an order was entered in the Recorder's Court, Detroit, Michigan whereby his conviction and sentence for this crime was set aside, and a plea of not guilty entered in the respondent's behalf. On May 28, 1954 a Judge of the Recorder's Court entered an order dismissing the case.

He was again convicted in the Recorder's Court, Detroit, Michigan on July 30, 1934 for the crime of "Malicious Threats to Extort" committed during May 1934. He was sentenced on October 22, 1934 to serve five to twenty years in the Detroit House of Correction as a result of this conviction.

As the respondent's conviction on the charge of Receiving Stolen Property was set aside by the Court order entered May 27, 1954, the charge contained in the warrant of arrest will not be sustained.

The respondent was convicted in the United States District Court for the Eastern District of Michigan on October 30, 1952 for the offense of Unlawful Purchase and Possession of Heroin. He was sentenced on October 30, 1952 to imprisonment for five years on Count One and nine years, eight months on Count Two of the indictment. The
14 judgment of the District Court was reversed, and the conviction set aside by the United States Court of Appeals, and the Board of Immigration Appeals, in an order dated May 18, 1954 found that the lodged charge based on his conviction on October 30, 1952 was not sustained.

On June 8, 1954 the Board of Immigration Appeals entered an order directing that the hearing be reopened

for the purpose of showing that the respondent's conviction for the crime of Receiving Stolen Property was set aside and for further appropriate action.

At the reopened proceeding an additional charge was lodged against the respondent based on his conviction in the United States District Court for the Eastern District of Michigan on April 13, 1925, when he entered a plea of guilty to violation of the Anti-Narcotic Law. The indictment sets forth that the respondent was charged with having, on November 29, 1924, unlawfully, feloniously and knowingly sell, dispense and distribute certain narcotic drugs, to wit: cocaine hydrochloride, and that he did have in his possession and under his control, and unlawfully, wilfully and knowingly purchased narcotic drugs, not in the original stamped packages, and not having on them the appropriate cancelled United States Internal Revenue Stamps. The respondent entered a plea of guilty to the charge contained in the indictment, and was sentenced to pay a fine of $1,000.00 and to be imprisoned in the Detroit House of Correction for sixty days. He was convicted for violation of Section One and Section Eight, Chapter One of the Act of December 17, 1914, as amended (38 Stat. 789, as amended). On the basis of all the evidence presented, it is concluded that the respondent is deportable only on the charge based on his narcotic conviction on April 13, 1926.

Application was made for the privilege of suspension of deportation, or in the alternative for voluntary departure. The respondent married a naturalized citizen of the United States on June 9, 1926. He has two children, 26 and 24 years of age, who were born in the United States. One of his children is crippled by poliomyelitis, and is dependent upon the respondent. In addition to the convictions previously discussed, the respondent was arrested on October 12, 1942 for Conspiracy to Violate the State Gambling Laws. He was convicted on the charge and sentenced to serve three to five years in Jackson Prison. He stated that he did not enter Jackson Prison until 1945, and he was paroled on October 18, 1948. Under Section 101(f)(7), the respondent cannot be found to be a person of good moral character, because of his confinement for a period of over 180 days. It will, therefore, be found that he is statutorily

ineligible for either suspension of deportation or voluntary departure.

In the event that he is deported from the United States he desires to be returned to Italy.

Findings of Fact:

(1) That the respondent is an alien, a native and citizen of Italy;

(2) That the respondent's only entry into the United States was on September 10, 1920 at the port of New York, New York;

(3) That the respondent was convicted in the Recorder's Court Detroit, Michigan on February 15, 1924 for the crime of Receiving Stolen Property;

(4) That the respondent's conviction for the crime of Receiving Stolen Property was set aside on May 27, 1954 by an order entered in the Recorder's Court, Detroit, Michigan, and on May 28, 1954 the case was dismissed;

16 (5) That the respondent was convicted in the Recorder's Court, Detroit, Michigan on July 30, 1934 for the crime of Malicious Threats to Extort;

(6) That the respondent was convicted in the United States District Court for the Eastern District of Michigan on October 30, 1952 for the offense of Unlawful Purchase and Possession of Heroin, which conviction was subsequently reversed by the Court of Appeals;

(7) That the respondent was convicted in the United States District Court for the Eastern District of Michigan on April 13, 1925 for Illegal Traffic of Narcotics, in violation of Section One and Section Eight, Chapter One of the Act of December 17, 1914, as amended (38 Stat. 789, as amended).

Conclusions of Law:

(1) That under Section 241(a)(4) of the Immigration and Nationality Act the respondent is not subject to deportation in that, he, at any time after entry, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit: Receiving Stolen Property and Malicious Threats to Extort;

(2) That under Section 241(a)(11) of the Immigra-

tion and Nationality Act the respondent is NOT subject to deportation in that, he has been convicted of a violation of any law or regulation governing or controlling, the taxing, manufacture, production compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein, to wit: Unlawful Purchase and Possession of Heroin (Violation of Sec. 2553(a), Title 26; U.S.C.A., and Sec. 174, Title 21, United States Code):

(3) That under Section 241(a)(11) of the Immigration and Nationality Act the respondent is subject to deportation in that, he has been convicted of a violation of any law or regulation governing or controlling, the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; to wit: Illegal Traffic of Narcotics, in violation of Section One and Section Eight, Chapter One of the Act of December 17, 1914, as amended (38 Stat. 786, as amended).

Order: It is ordered that the alien be deported from the United States in the manner provided by law on the following charge:

Section 241(a)(11) of the Immigration and Nationality Act, in that, he has been convicted of a violation of any law or regulation governing or controlling, the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; to wit: Illegal Traffic of Narcotics, in violation of Section One and Section Eight, Chapter One of

the Act of December 17, 1914, as amended (38 Stat. 786, as amended).

(S.) A. W. Lombardini, Special Inquiry Officer.

AWL/cmw.

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18 BEFORE THE BOARD OF IMMIGRATION APPEALS

U. S. Department of Justice, Board of Immigration Appeals

In Behalf of Service: Hyman Scher, Service Representative (Heard: September 24, 1954).

Charges:

Warrant: Act of 1952—Convicted of two crimes after entry—Receiving stolen property and malicious threats to extort.

Lodged: Act of 1952—Convicted of narcotic violation on April 9, 1952.

Lodged: Act of 1952—Convicted of narcotic violation on April 13, 1925.

DECISION OF BOARD OF IMMIGRATION APPEALS—October 28, 1954

Application: Termination of proceedings or suspension of deportation or voluntary departure.

Detention Status: Released on bond.

This case is before us on appeal from the decision of a special inquiry officer on August 20, 1954, directing that the respondent be deported.

The respondent is a 54-year-old male, native and citizen of Italy, whose only entry occurred on September
19 10, 1920. The charge stated in the warrant of arrest was predicated on two convictions, one of these being a conviction on February 15, 1924 for receiving stolen property. On May 27, 1954 the respondent's motion to withdraw his plea of guilty was granted, his conviction and sentence were set aside and on the following day the case was dismissed. Under these circumstances, the warrant charge is not sustained. The first lodged charge is not sustained because the respondent's conviction on a narcotic

charge in 1952 was reversed by the United States Court of Appeals for the Sixth Circuit on December 1, 1953.

The question of whether the respondent is deportable now depends solely on a charge which was lodged at the reopened hearing on July 19, 1954. This charge is based on the respondent's conviction in 1925 for a violation of sections 1 and 8 of the Act of December 17, 1914 as amended, at which time he was sentenced to imprisonment for a term of 60 days and was fined $1,000.

The indictment, in that case, charged the respondent and one other person with a sale of a quantity of cocaine hydrochloride and with the possession and purchase of 385 grains of cocaine hydrochloride.

We have carefully considered the contentions of counsel at the oral argument. *Ex parte Robles—Rubio*, 119 F. Supp. 610 (N.D. Cal. 1954)), cited by counsel, is not analogous. That alien was convicted of a narcotic violation on August 27, 1952; on September 23, 1952 the Court recommended that he be not deported; and in deportation proceedings instituted after the effective date of the Immigration and Nationality Act, the Court held that the savings clause of section 405(a) of that Act continued to relieve him from deportation. There were two narcotic convictions in the respondent's case—one on April 13, 1925 and the other on April 9, 1952. On October 30, 1952 sentence was imposed in connection with the latter conviction and on November 25, 1952 the Court stated (Ex. 14) that the conviction was not to be used for the purpose of deportation. The 1952 conviction was reversed by the Court of Appeals and the deportation proceeding is now predicated only on the 1925 conviction. Since there was no recommendation against deportation in connection with the 1925 conviction, it follows that deportation on the basis of that conviction is not precluded by the action of the Court in the 1952 case.

Counsel urges that the 1925 conviction was also before the Court in 1952 because an information was filed by the United States Attorney on June 19, 1952 (Ex. 18) charging the respondent as a second offender and setting forth the two narcotic convictions mentioned above. We do not agree that, because of these circumstances, the Court was in a position to recommend against deportation in the 1925 case.

particularly since the applicable statutory provision[1] specifically authorized that action only at the time of imposing sentence or within 30 days thereafter.

Counsel argues that the respondent applied to the Governor of Michigan for a pardon and was subsequently informed by the Governor's Legal Advisor on July 18, 1950, (Ex. 22) that the Immigration and Naturalization
21 Service had stated that he was not deportable. However, Exhibit 22 does not indicate that such a statement was made by the Service. On the contrary, that letter makes no mention whatever of the Service, or of any information received from the Service and clearly shows that it was the Parole Board who reported to the Governor that the respondent was not then subject to deportation.

It is also contended by counsel that, until at least the Alien Registration Act of 1940, the respondent's conviction in 1925 did not subject him to deportation; that it would constitute increasing the penalty after the commission of the offense if we were now to hold that the respondent is deportable; and that this would be a violation of due process. In this connection, he cites *U. S. ex rel. Cassetta* v. *Watkins*, 73 F. Supp. 399 (S. D. N. Y. 1947). We fail to perceive how this case is of assistance to counsel since the decision was against the alien and his contentions were rejected. The statement by the court, in that case, that section 21 of the Alien Registration Act of 1940 was not retrospective was based on the specific statutory provision to that effect in section 22 of the same Act. There is, however, no similar provision in the Immigration and Nationality Act.

The respondent actually did not become deportable, because of the 1925 conviction, until the effective date of the Immigration and Nationality Act (December 24, 1952). The argument that the penalty or punishment is being increased after the offense was committed is, in reality, a contention that section 241(a)(11) is repugnant to the Constitutional prohibition against ex post facto laws.
22. It is well settled that the ex post facto provision of the Constitution applies only to criminal laws and

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[1] Section 19 of the Immigration Act of 1917 (39 Stat. 889-890; former 8 U. S. C. 155).

not to deportation proceedings,[2] and counsel, conceding this, seeks to utilize the due process clause. While the statute has a retroactive effect in the respondent's case, it is well settled judicially that an alien remains subject to the plenary power of Congress to expel him under the nation's sovereign right to determine what noncitizens shall be permitted to remain in this country.[3] In *Harisiades* v. *Shaughnessy*, supra (footnote 2), the Court concluded that a legally resident alien could be deported because of membership in the Communist Party which terminated before the 1940 amendment[4] on which the deportation proceedings were predicated, and it specifically rejected the argument that this violated the due process clause of the Constitution.

In *Matter of I.*, Int. Dec. 469 (decided July 21, 1953), *Matter of M.*, Int. Dec. 442 (decided June 1, 1953) and *Matter of P.*, Int. Dec. 566 (decided January 28, 1954), all of which involved deportation proceedings based on narcotic convictions, we held that the aliens were deportable under the Immigration and Nationality Act although they had not been deportable prior to the effective date of that Act. The courts have also upheld certain retroactive provisions of the Immigration and Nationality Act,[5]

23 Counsel also contends that the respondent was unable to ask the Court to recommend against deportation at the time of his conviction in 1925 because he was

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[2] *Mahler* v. *Eby*, 264 U.S. 32, 39; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 595 (1952).

[3] *Carlson* v. *Landon*, 342 U.S. 524 (1952); *Harisiades* v. *Shaughnessy*, supra (footnote 2) at page 587; *Marcello* v. *Ahrens*, 212 F. 2d 830, 836 (C.A. 5, 1954).

[4] Act of October 16, 1918 (40 Stat. 1012; 41 Stat. 1008-9) as amended by section 23 of the Alien Registration Act of 1940 (54 Stat. 673).

[5] *U.S. ex rel. Marcello* v. *Ahrens*, 113 F. Supp. 22, 26, aff'd sub nom. *Marcello* v. *Ahrens*, supra (footnote 3) where the deportation proceeding was based on a marihuana conviction in 1938 which would not have constituted a ground for deportation prior to December 24, 1952 because of the specific provisions of section 22 of the Alien Registration Act of 1940; *U.S. ex rel. Barile* v. *Murff*, 116 F. Supp. 163 (D.C. Md. 1953).

not then deportable. A similar contention was advanced and rejected by the Court in *U.S. ex rel, Circella* v. *Neelly*, 115 F. Supp. 615, 626 (N.D. Ill. 1953) in which the alien was held to be deportable under the Immigration Act of 1917 because of a conviction for a crime prior to entry but could not have applied for recommendation against deportation because the conviction took place on September 24, 1916.

For the reasons stated above, we hold that the respondent is deportable on the second lodged charge under section 241(a)(11) of the Immigration and Nationality Act, based upon the narcotic conviction of April 13, 1925. With respect to the application for suspension of deportation (Ex. 20) which was submitted on August 18, 1954, the respondent is required to prove good moral character during the preceding 10 years under the applicable statutory provision, (section 244(a)(5) of the Immigration and Nationality Act) and our decision in *Matter of M.*, Int. Dec. 442, supra. Section 101(f)(7) of that Act precludes a finding of good moral character in the respondent's case since he was confined in a penal institution from approximately November 1945 to October 1948.

24-25 Although application was also made for voluntary departure, there is some doubt whether the respondent would accept that relief since he would be excludable under section 212(a)(23) of the Immigration and Nationality Act if he attempted to return to the United States. Under section 244(e) of the same Act, voluntary departure cannot be granted to an alien within the provisions of section 241(a)(11) unless he is within the provisions of paragraph (4) or (5) of section 244(a). Paragraph (5) is the applicable paragraph and requires that good moral character be proved for a period of 10 years, whereas section 244(e) requires such proof for five years. As we have indicated above, the respondent cannot prove good moral character for 10 years. We deem it unnecessary to determine definitely whether the respondent would be required to establish good moral character for five years or for 10 years in order to be eligible for voluntary departure since we would deny voluntary departure in this case, in any event, as a matter of administrative discretion. In view of the foregoing, we will direct that the appeal be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

_____, Acting Chairman.

26 In United States Court of Appeals for the Sixth Circuit

Minute Entry of Argument and Submission—June 6, 1956
(omitted in printing)

In United States Court of Appeals

Order of Substitution—Filed June 15, 1956

Upon motion of the appellant, and for good cause shown,
It is ordered that John F. Mulcahey, Acting District Director, United States Immigration and Naturalization Service, Detroit District, be substituted as the appellee in this appeal in place of James W. Butterfield.

27-28 In United States Court of Appeals

Judgment—Entered August 27, 1956

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded with directions to discharge Catalanotte from custody under the order and warrant for deportation.

29 [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12729

In the Matter of the Petition of Guiseppe Catalanotte for a Writ of Habeas Corpus, GUISEPPE CATALANOTTE, *Petitioner-Appellant*,

v.

JAMES W. BUTTERFIELD, Dist. Director of Immigration and Naturalization Service, Detroit District, *Respondent-Appellee*.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINION—Decided August 27, 1956

Before ALLEN, McALLISTER, and MILLER, Circuit Judges.

McALLISTER, Circuit Judge. In 1925, appellant was convicted on a charge of violating the narcotics law. He was sentenced to imprisonment for a term of sixty days and ordered to pay a fine of $1,000. He served the sentence and paid the fine.

After his conviction, and after he had served the above sentence, he married a young Italian woman who has since become a naturalized citizen. He has two daughters. The older daughter, now twenty-seven years old, has been an invalid since she suffered infantile paralysis at the age of fourteen months. Appellant is the sole support of his wife and children.

Thirty years subsequent to his conviction, in August, 1954, appellant was ordered deported by the Board of Immigration Appeals for the offense which he committed in 1925. From the order of deportation, appellant sought review by way of a petition for a writ of habeas corpus; and from an order of the district court denying his petition, he appeals.

The deportation proceedings are based upon the Immigration and Nationality Act of 1952. Section 241(a)(11)[1] of that statute provides:

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[1] 66 Stat. 204, Title 8, U.S.C.A., Section 1251(a)(11).

"Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who is, or hereafter *at any time after entry* has been, a narcotic drug addict, or who *at any time has been convicted* of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves of isonipecaine or any addiction-forming or addiction-sustaining opiate;" (Emphasis supplied.)

The government contends that, upon proof that appellant was convicted of a violation of a law relating to the illicit traffic in narcotic drugs in 1925, he is, under the above section of the statute, deportable, and that the district court properly denied his petition for a writ of habeas corpus, which was the method adopted to review the decision of the Board of Immigration Appeals.

Appellant's defense to the proceedings for deportation is founded upon the so-called "savings clause" of the Immigration and Nationality Act of 1952. Section 405(a)[2] of the statute provides:

"Nothing contained in this Act, unless *otherwise specifically provided therein*, shall be construed to affect the validity of any declaration of intention, . . . warrant of arrest, order or warrant of deportation, . . . which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions,

[2] See Title 8, U.S.C.A., Section 1101 (page 196).

suits, actions, proceedings, statutes,[3] conditions, rights, acts, things, liabilities, obligations, or matters, the statutes or parts of statutes repealed by this Act are, *unless otherwise specifically provided therein*, hereby continued in force and effect. . . ." (Emphasis supplied.)

Appellant claims that prior to the enactment of the Immigration and Nationality Act of 1952, he had a nondeportable status and that, by virtue of the above mentioned savings clause, such nondeportable status was not affected by any other provision of such Act, inasmuch as it was not specifically provided therein that the statute should be construed to affect such status. The record discloses that appellant, prior to the Act of 1952, had the status of a nondeportable alien. The Board of Immigration Appeals, in its decision in the instant case, properly found from the evidence that: "The respondent actually did not become deportable, because of the 1925 conviction, until the effective date of the Immigration and Nationality Act (December 24, 1952)."

United States v. *Kershner*, 228 F. 2d 142 (C. A. 6), involved an alien who had entered the United States as a stowaway in 1919, and achieved nondeportable status at the end of five years' residence in this country. He later had been convicted of two separate offenses, but had again achieved a nondeportable status, under the law then in effect, by a conditional pardon as to the second offense. In deportation proceedings, brought under the 1952 Act, this court, in an able and comprehensive opinion by Judge Stewart, held that such an alien was protected in his nondeportable status by the general savings clause in the Immigration and Nationality Act of 1952, notwithstanding certain other provisions of the Act which would otherwise operate to deprive him of such nondeportable status. In the *Kershner* case, the court had before it a section of the statute relating to stowaways, providing that "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

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[3] Probably should read "statuses." See Title 8, U.S.C.A., Section 1101 (page 156).

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." Moreover, with regard to the alien's
32 deportation by reason of his two criminal convictions, a section of the statute provided that: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—. . . (4) . . . at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . ." The second section of the statute provided that: "The provisions of [the foregoing section] respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and *unconditional* pardon by . . . the Governor of any of the several states . . . ." (Emphasis supplied.) Considering the above cited statutory provisions, standing alone, the court said that they would require affirmance of the district court's order denying a writ of habeas corpus, or, in other words, that the alien would, under the quoted statutory provisions, have no defense to deportation. However, the court went on to point out that Section 405 of the Immigration and Nationality Act of 1952 contained a broad general savings clause, and that this clause preserved the alien's status of nondeportability "unless otherwise specifically provided" in the Act. Since the Act did not specifically provide that the alien's status of nondeportability was not preserved, the court held he was not deportable.

In *United States* v. *O'Rourke*, 213 F.2d 759 (C. A. 8), an alien who, in 1943, had been twice convicted of violation of the law relating to illicit traffic in narcotic drugs, had acquired the status of a nondeportable alien by virtue of the recommendations to the district judge against deportation under Title 8 U.S.C., Section 155(a), 1940 Ed. Under the 1952 Act, deportation proceedings were brought under the same sections of the statute relied upon by the government to deport Catalanotte in the instant case. The court of appeals held that the alien could not be deported under the 1952 Act since he had previously acquired the status of a nondeportable alien, and that such status was protected by the savings clause contained in Section 405 of the Act,

since there was no *specific* provision in the Act that operated to deprive him of such status.

We are confronted with the same general savings clause in the instant case. While the pertinent provision of the statute provides that "Any alien . . . shall, upon the order of the Attorney General, be deported who is, or hereafter at any time after entry . . . has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs . . . ," such provision does not apply to an alien who, prior to the enactment of the statute, had acquired a status of nondeportability, unless, under Section 405 of the Act, it was specifically provided that such status should not be preserved. It was not specifically provided in the Act that appellant's prior status of nondeportability should be set aside. "The savings clause is to be interpreted as protecting status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear. It was held in [*Shomberg v. United States*, 348 U. S. 540][1] that such intent is clear where it is specifically provided that a provision shall be effective 'notwithstanding' the terms of the savings clause. 'No such clear manifestation of intent is apparent in the present case.'". *United States v. Kershner*, 228 F. 2d 142, 146 (C. A. 6):

In the long and complex provisions in the Immigration and Nationality Act, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10. It was said in *United States v. O'Rourke*, 213 F. 2d 759, 765 (C. A. 8): "It seems apparent that the controlling question in this case can be put at rest only by the Supreme Court or by an amendment to the Act. We feel justified in ruling that there is no clear-cut authority in the Act for depriving [the alien] of the status of a nondeportable alien . . . ."

We conclude that Catalanotte's status of nondeportability is protected by Section 405 of the Act, since the

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[1] The Supreme Court, in the *Shomberg* case, pointed out five cases in the 1952 Act where Congress had clearly manifested its intention that certain policies should override the otherwise broad and pervasive principle of the savings clause. 348 U. S. at page 547.

statutory provisions upon which the government relies do not constitute such specific exceptions to Section 405 as are contemplated in that Section in order to make it inapplicable.

It is unnecessary to discuss appellant's claim that the Immigration and Nationality Act of 1952, in its application to him in seeking to make his prior conduct grounds for deportation, is an ex post facto law and, therefore, unconstitutional; but this court has held to the contrary. *United States* v. *Koreshner*, 228 F. 2d 142, 144, 145 (C. A. 6). *Marcello* v. *Bonds*, 349 U. S. 302, cited by the government, is not here applicable since it is not concerned with
34 the savings clause which is the provision of the statute that controls disposition of this case.

The judgment appealed from is reversed and the case is remanded with directions to discharge Catalanotte from custody under the order and warrant for deportation.

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35 Clerk's Certificate to foregoing transcript omitted in printing.

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36 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956.

No. 435

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 19, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 72.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 435

In the Supreme Court of the United States

October Term, 1956

JOHN P. MURPHY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER,

v.

GIUSEPPE CARLUCCIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney, Department of Justice,
Washington, D. C.

this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

STATEMENT

Respondent is an alien who entered the United States in 1920. In May 1953, deportation proceedings were instituted against him on the basis of a 1952 conviction for violation of the federal narcotics laws and conviction after entry of two crimes involving moral turpitude—a 1924 conviction for receiving stolen property and a 1934 conviction for malicious threats to extort (see R. 26–28). The 1952 conviction was reversed on appeal and, after respondent had been ordered deported (see R. 50–56), he was allowed to withdraw his plea of guilty to the 1924 charge of receiving stolen property, and the case was dismissed in May, 1954 (see R. 27). As a result, the deportation proceedings were ordered reopened (see R. 28).

At a new hearing, at which petitioner was represented by counsel (R. 26), a new charge was lodged alleging that respondent was deportable by reason of his conviction in 1925 in the United States District Court for the Eastern District of Michigan of violations of federal laws relating to narcotics (R. 33, see R. 43–45). The special inquiry officer found petitioner deportable on that charge (R. 30–31), and the Board of Immigration Appeals sustained his ruling (R. 2–8).

After petitioner had been taken into custody for deportation, he challenged the order of deportation by a petition for a writ of habeas corpus filed in the United States District Court for the Eastern Dis-

trict of Michigan (R. 1b–2b). The District Court, after argument, denied the writ (R. 6b). The Court of Appeals reversed, holding that, since petitioner's conviction for violation of the narcotics laws was not a ground for deportation prior to the Immigration and Nationality Act of 1952, petitioner had a status of non-deportability which was preserved by the savings clause (Section 405 (a) of that Act), despite the provision of Section 241 (a) (11) of the 1952 Act providing for the deportation of an alien "who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs." The Court of Appeals expressed the view that the decision of this Court in *Marcello* v. *Bonds*, 349 U. S. 302, in which the deportation of an alien convicted of narcotics violations which were not grounds for deportation before 1952 had been sustained, was "not * * * applicable since it is not concerned with the savings clause which is the provision of the statute that controls disposition of this case" (App., *infra*, p. 14).

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit in this case follows its prior decision in *United States ex rel. Carson* v. *Kershner*, 228 F. 2d 142, now pending on the Government's petition for a writ of certiorari, *sub nom. Lehmann* v. *United States ex rel. Carson*, No. 72, this Term. In that case, the court held that a person who, having entered this country as a stowaway in 1919, had not been deported within the five year period of limitations provided in Section 19 of the Immigration Act of 1917, and who had been convicted of two crimes

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ____

JOHN F. MULCAHEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER [1]

v.

GUISEPPE CATALANOTTE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing the order of the United States District Court for the Eastern District of Michigan, which had denied respondent's petition for a writ of habeas corpus.

OPINION BELOW

The opinion of the Court of Appeals, set forth in the Appendix, *infra,* pp. 8–14, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1956 (App., *infra,* p. 15). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] John F. Mulcahey was, on June 15, 1956, substituted for James W. Butterfield who had been district director at the time the petition for habeas corpus was filed.

QUESTION PRESENTED

Whether an alien, convicted of a narcotics violation in 1925 and not deportable by reason of that conviction prior to the Immigration and Nationality Act of 1952, had a "status" of nondeportability which was preserved to him by the savings clause of the 1952 Act, despite the fact that Section 241 (a) (11) of the 1952 Act makes such conviction a ground of deportation and Section 241 (d) expressly makes retroactive the grounds of deportation specified in that Act.

STATUTES INVOLVED

Section 241 (a) (11) of the Immigration and Nationality Act of 1952 [8 U. S. C. 1251 (a) (11); 66 Stat. 206] provides:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or

isonipecaine or any addiction-forming or addiction-sustaining opiate;

Section 241 (d) [8 U. S. C. 1251 (d); 66 Stat. 208] provides:

> Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 405 (a) [8 U. S. C. 1101, Note; 66 Stat. 280] provides:

> Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by

involving moral turpitude which had not both been grounds of deportation before 1952, had acquired a status of non-deportability which was saved by the general savings clause, Section 405 (a) of the 1952 Act. This ruling was made despite the provision of Section 241 (d) making the grounds of deportation in the 1952 act applicable, unless otherwise provided, notwithstanding "that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

Any possible interpretation of the *Carson* decision as limited to the particular grounds of deportability there involved has been negated by the instant decision which applies the same concept of a status of non-deportability to a conviction for violation of the narcotics laws, which was not grounds for deportation before 1952, despite Section 241 (d) and despite Section 241 (a) (11) which provides for the deportation of an alien "who at any time has been convicted" of narcotics violations. In the petition for certiorari in *Carson* we pointed out that that decision, although involving different grounds of deportation, was basically in conflict with the decision of the Fifth Circuit in *Gagliano* v. *Bonds*, 222 F. 2d 958, 959 (C. A. 5), certiorari denied, 350 U. S. 902, holding explicitly that the savings clause did not apply to one convicted of narcotics violations who was not deportable before 1952, and was also inconsistent with the implications of the ruling of this Court in *Marcello* v. *Bonds*, 349 U. S. 302, upholding the deportation of one convicted of narcotics violations who had not been deportable

before 1952. That conflict is made direct by the instant decision, which involves the very same ground of deportation as *Gagliano* and *Marcello,* and which upholds, as to the same factual situation of conviction for narcotics violations not a basis for deportation before 1952, the very contentions with respect to the general savings clause which were rejected, partly on the basis of *Marcello,* by the Fifth Circuit in *Gagliano.*

The importance to the administration of the immigration laws of a resolution of the conflict is discussed in the petition in No. 72. Under the reasoning of the court below, no pre-1952 act which was not a ground of deportation before 1952 would constitute a basis for deportation under the present statute.

CONCLUSION

In view of the direct conflict between the decision below and that of the Fifth Circuit in *Gagliano* v. *Bonds,* 222 F. 2d 958, certiorari denied, 350 U. S. 902, and for the other reasons discussed in the petition for certiorari in No. 72, this Term, it is respectfully submitted that this petition, as well as that in No. 72, should be granted, and the two cases considered together.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1956.

398769—56——2

APPENDIX

1. Opinion of the Court of Appeals

No. 12729

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In the Matter of the Petition of Guiseppe Catalanotte for a Writ of Habeas Corpus

Guiseppe Catalanotte, petitioner-appellant

v.

James W. Butterfield, District Director of Immigration and Naturalization Service, Detroit District, respondent-appellee

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division

Decided August 27, 1956

Before Allen, McAllister, and Miller, Circuit Judges.

McAllister, Circuit Judge. In 1925, appellant was convicted on a charge of violating the narcotics law. He was sentenced to imprisonment for a term of sixty days and ordered to pay a fine of $1,000. He served the sentence and paid the fine.

After his conviction, and after he had served the above sentence, he married a young Italian woman who has since become a naturalized citizen. He has two daughters. The older daughter, now twenty-seven years old, has been an invalid since she suffered infantile paralysis at the age of fourteen months. Appellant is the sole support of his wife and children.

Thirty years subsequent to his conviction, in August, 1954, appellant was ordered deported by the Board of Immigration Appeals for the offense which he committed in 1925. From the order of deportation, appellant sought review by way of a petition for a writ of habeas corpus; and from an order of the district court denying his petition, he appeals.

The deportation proceedings are based upon the Immigration and Nationality Act of 1952. Section 241 (a) (11)[1] of that statute provides:

> "Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who is, or hereafter *at any time after entry* has been, a narcotic drug addict, or who *at any time has been convicted* of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves of isonipecaine or any

[1] 66 Stat. 204, Title 8, U. S. C. A. Section 1251 (a) (11).

addiction-forming or addiction-sustaining opiate;". (Emphasis supplied.)

The government contends that, upon proof that appellant was convicted of a violation of a law relating to the illicit traffic in narcotic drugs in 1925, he is, under the above section of the statute, deportable, and that the district court properly denied his petition for a writ of habeas corpus, which was the method adopted to review the decision of the Board of Immigration Appeals.

Appellant's defense to the proceedings for deportation is founded upon the so-called "savings clause" of the Immigration and Nationality Act of 1952. Section 405 (a)[2] of the statute provides:

> "Nothing contained in this Act, unless *otherwise specifically provided therein,* shall be construed to affect the validity of any declaration of intention, * * * warrant of arrest, order or warrant of deportation, * * * which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes,[3] conditions, rights, acts, things, liabilities, obligations, or matters, the statutes or parts of statutes repealed by this Act are, *unless otherwise specifically provided therein,* hereby continued in force and effect. * * *" (Emphasis supplied.)

Appellant claims that prior to the enactment of the Immigration and Nationality Act of 1952, he had a

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[2] See Title 8, U. S. C. A., section 1101 (page 156).

[3] Probably should read "statuses." See Title 8, U. S. C. A., Section 1101 (page 156).

nondeportable status and that, by virtue of the above mentioned savings clause, such nondeportable status was not affected by any other provision of such Act, inasmuch as it was not specifically provided therein that the statute should be construed to affect such status. The record discloses that appellant, prior to the Act of 1952, had the status of a nondeportable alien. The Board of Immigration Appeals, in its decision in the instant case, properly found from the evidence that: "The respondent actually did not become deportable, because of the 1925 conviction, until the effective date of the Immigration and Nationality Act (December 24, 1952)."

United States v. *Kershner,* 228 F. 2d 142 (C. A. 6), involved an alien who had entered the United States as a stowaway in 1919, and achieved nondeportable status at the end of five years' residence in this country. He later had been convicted of two separate offenses, but had again achieved a nondeportable status, under the law then in effect, by a conditional pardon as to the second offense. In deportation proceedings, brought under the 1952 Act, this court, in an able and comprehensive opinion by Judge Stewart, held that such an alien was protected in his nondeportable status by the general savings clause in the Immigration and Nationality Act of 1952, notwithstanding certain other provisions of the Act which would otherwise operate to deprive him of such nondeportable status. In the *Kershner* case, the court had before it a section of the statute relating to stowaways, providing that "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." Moreover, with regard to the

alien's deportation by reason of his two criminal convictions, a section of the statute provided that: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— * * * (4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct * * *." The second section of the statute provided that: "The provisions of [the foregoing section] respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and *unconditional* pardon by * * * the Governor of any of the several states * * *." [Emphasis supplied.] Considering the above cited statutory provisions, standing alone, the court said that they would require affirmance of the district court's order denying a writ of habeas corpus, or, in other words, that the alien would, under the quoted statutory provisions, have no defense to deportation. However, the court went on to point out that Section 405 of the Immigration and Nationality Act of 1952 contained a broad general savings clause, and that this clause preserved the alien's status of nondeportability "unless otherwise specifically provided" in the Act. Since the Act did not specifically provide that the alien's status of nondeportability was not preserved, the court held he was not deportable.

In *United States* v. *O'Rourke,* 213 F. 2d 759 (C. A. 8), an alien who, in 1943, had been twice convicted of violation of the law relating to illicit traffic in narcotic drugs, had acquired the status of a nondeportable alien by virtue of the recommendations to the district judge against deportation under Title 8 U. S. C., Section 155 (a), 1940 Ed. Under the 1952 Act, deportation proceedings were brought under the same sections

of the statute relied upon by the government to deport Catalanotte in the instant case. The court of appeals held that the alien could not be deported under the 1952 Act since he had previously acquired the status of a nondeportable alien, and that such status was protected by the savings clause contained in Section 405 of the Act, since there was no *specific* provision in the Act that operated to deprive him of such status.

We are confronted with the same general savings clause in the instant case. While the pertinent provision of the statute provides that "Any alien * * * shall upon the order of the Attorney General, be deported who is, or hereafter at any time after entry * * * has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs * * *," such provision does not apply to an alien who, prior to the enactment of the statute, had acquired a status of nondeportability, unless, under Section 405 of the Act, it was specifically provided that such status should not be preserved. It was not specifically provided in the Act that appellant's prior status of nondeportability should be set aside. "The savings clause is to be interpreted as protecting status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear. It was held in [*Shomberg* v. *United States,* 348 U. S. 540][4] that such intent is clear where it is specifically provided that a provision shall be effective 'notwithstanding' the terms of the savings clause. No such clear manifestation of intent is apparent in the present case." *United States* v. *Kershner,* 228 F. 2d 142, 146 (C. A. 6).

[4] The Supreme Court, in the *Shomberg* case, pointed out five cases in the 1952 Act where Congress had clearly manifested its intention that certain policies should override the otherwise broad and pervasive principle of the savings clause. 348 U. S. at page 547.

In the long and complex provisions in the Immigration and Nationality Act, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10. It was said in *United States* v. *O'Rourke,* 213 F. 2d 759, 765 (C. A. 8): "It seems apparent that the controlling question in this case can be put at rest only by the Supreme Court or by an amendment to the Act. We feel justified in ruling that there is no clear-cut authority in the Act for depriving [the alien] of the status of a nondeportable alien * * *."

We conclude that Catalanotte's status of nondeportability is protected by Section 405 of the Act, since the statutory provisions upon which the government relies do not constitute such specific exceptions to Section 405 as are contemplated in that Section in order to make it inapplicable.

It is unnecessary to discuss appellant's claim that the Immigration and Nationality Act of 1952, in its application to him in seeking to make his prior conduct grounds for deportation, is an ex post facto law and, therefore, unconstitutional; but this court has held to the contrary. *United States* v. *Kershner,* 228 F. 2d 142, 144, 145 (C. A. 6). *Marcello* v. *Bonds,* 349 U. S. 302, cited by the government, is not here applicable since it is not concerned with the savings clause which is the provision of the statute that controls disposition of this case.

The judgment appealed from is reversed and the case is remanded with directions to discharge Catalanotte from custody under the order and warrant for deportation.

2. Judgment of the Court of Appeals

Entered August 27, 1956

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded with directions to discharge Catalanotte from custody under the order and warrant for deportation.

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No. 435

In the Supreme Court of the United States

OCTOBER TERM, 1956

JOHN F. MULGAHEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER

v.

GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

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JOHN F. MULCAHEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER[1]

v.

GUISEPPE CATALANOTTE

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 20–25) is reported at 236 F. 2d 955.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1956 (R. 19). The petition for a writ of certiorari was filed on September 19, 1956, and was granted on November 19, 1956 (R. 25). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

[1] John F. Mulcahey was, on June 15, 1956, substituted for James W. Butterfield, who had been District Director at the time the petition for habeas corpus was filed (R. 19).

QUESTION PRESENTED

Whether an alien, convicted of a narcotics violation prior to the Immigration and Nationality Act of 1952, and not deportable therefor prior to that Act, has a protected "status" of nondeportability under the savings clause of the 1952 Act, Section 405 (a), despite the provisions of Section 241 which make such conviction a ground for deportation and which expressly make this ground retroactive "[e]xcept as otherwise specifically provided in this section."

STATUTES INVOLVED

The Immigration and Nationality Act of 1952 provides:

> Section 241 [66 Stat. 206; 8 U. S. C. 1251]:
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or

isonipecaine or any addiction-forming or addiction-sustaining opiate * * *.

* * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * *

Section 405 (a) [66 Stat. 280; 8 U. S. C. 1101, Note]:

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically pro-

vided therein, hereby continued in force and effect. * * *

STATEMENT

Respondent, an alien who entered the United States in 1920 (R. 14), was convicted in 1925 of a federal offense relating to the illicit traffic in narcotic drugs, *i. e.*, sale of a quantity of cocaine hydrochloride and possession and purchase of 385 grains thereof (R. 9, 12 (par. 7), 13 (par. 3 and Order), 15). Pursuant to Sec. 241 (a) (11) and (d) of the Immigration and Nationality Act of 1952, he was ordered deported (R. 13–14).[2]

After respondent had been taken into custody for deportation, he challenged the order of deportation by a petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of Michigan (R. 1–2). The District Court, after argument, denied the writ (R. 6).

The Court of Appeals reversed, holding (R. 24) that, since respondent's conviction for violation of the narcotics laws was not, in itself, a ground for deporta-

[2] The deportation proceedings first proceeded upon the basis of a 1952 conviction for violation of the federal narcotics laws and conviction of two crimes involving moral turpitude: a 1924 conviction for receiving stolen property, and a 1934 conviction for malicious threats to extort (R. 10). However, after the institution of the deportation proceedings, the Recorder's Court of Detroit permitted respondent, in 1954, to withdraw his 1924 plea of guilty and thereupon dismissed the case (R. 10). The 1952 federal conviction was reversed upon appeal (R. 10). The deportation proceedings were reopened and the further charge was lodged upon the basis of respondent's conviction in 1925 of violations of the federal narcotics laws (R. 15). It was upon this charge that the Special Inquiry Officer found respondent deportable (R. 13), and the Board of Immigration Appeals affirmed (R. 15, 18).

tion prior to the Immigration and Nationality Act of 1952,[3] respondent had a "status" of nondeportability which was preserved by the savings clause of the 1952 Act, Section 405 (a). The court held inapplicable the provision of Section 241 (a) (11), providing for the deportation of an alien "who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs," and made no mention of Section 241 (d), providing for the retroactive effect of Section 241 (a).

SUMMARY OF ARGUMENT

I

A. Section 241 (a) (11) of the Immigration and Nationality Act of 1952 provides for the deportation of any alien who "at any time has been convicted" of a narcotics offense, and Section 241 (d) makes the section applicable "notwithstanding" that the conviction occurred prior to the 1952 Act. This language is so emphatically retrospective that the savings clause of the 1952 Act, Section 405 (a), cannot come into play since Section 405 (a) by its own terms does not apply where it is otherwise specifically provided in the Act.

Subsection (d) of Section 241 deals explicitly with the question of whether there are to be *any* exceptions to the retrospective application of the provisions of subsection (a). Subsection (d) states that it shall make no difference that the factual basis of deportation predated the Act "[e]xcept as otherwise specifi-

[3] Prior to 1952, deportation could not be based on a single narcotics conviction.

cally provided *in this section*" (emphasis added). And there actually are exceptions in Section 241, expressed by the use of the word "hereafter," to which the above quoted language is applicable. Two conclusions follow, we believe. First, no exception was to be made to the retrospective effect of Section 241 (d) by reason of any provision other than provisions in "this section". Congress patently was not saying "this section" when it meant "this Act", particularly if it meant a general savings clause elsewhere in the "Act". Secondly, the exceptions within Section 241 demonstrate that to "specifically provide" an exception, in the pattern of draftsmanship of this Act, does not mean that any magic words such as "notwithstanding Subsection (d)" are required; the use of the word "hereafter" suffices, for example. Similarly, in order to provide an exception to the savings clause of Section 405 (a) under its own comparable words—"otherwise specifically provided"—it is not necessary that, in each of the instances where the savings clause is not to apply, there must be a ritualistic repetition of the words "notwithstanding the provisions of Section 405 (a)". A specific retrospective provision by its very nature constitutes a specific exception to a savings clause.

This Court so recognized in *Shomberg* v. *United States*, 348 U. S. 540, in holding that a provision barring a hearing on a naturalization petition pending a hearing on deportation was effective despite the failure, in the pertinent Section 318, specifically to except Section 405 (a) with a "notwithstanding" clause as was done in the same Section 318 with respect to Sec-

tion 405 (b). The Court relied upon the obvious "congressional purpose to override the savings clause."

Directly applicable to the instant case is *Marcello* v. *Bonds*, 349 U. S. 302, also involving deportation under the instant Section 241 (a) (11) by reason of a pre-1952 narcotics conviction. The issue of the applicability of the savings clause in Section 405 (a) was before this Court in that case not only in the specific holding of the Board of Immigration Appeals, but also in a special supplemental petition for certiorari exclusively directed to the point. Although this Court denied the supplemental petition (348 U. S. 805) and addressed its opinion to other issues, it presumably would not have passed on the constitutional validity of Section 241 (a) (11) under the *ex post facto* clause if there existed any doubt as to the retrospective nature of the statute. In fact, the Court's holding has been held to be a disposition of the issue (*Gagliano* v. *Bonds*, 222 F. 2d 958, 959 (C. A. 5), certiorari denied, 350 U. S. 902).

B. The legislative history supports the foregoing interpretation of the statute. Committee reports, as well as analyses prepared for the legislators by the Immigration Service, show a clear recognition of the retrospective effect of Section 241 (d) and likewise give no indication that the general savings clause was to countervail the express retrospective language in Section 241 (a) (11) concerning narcotics offenders.

II

For yet another reason, the savings clause of Section 405 (a) is of no avail to respondent. Respondent

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has not acquired a "status, condition, [or] right in process of acquisition" merely by the earlier forbearance of Congress to provide deportation for the particular crime of which he was convicted. The failure of Congress to take every action which it might constitutionally take with respect to an offense is not comparable to the affirmative tendering of a privilege to an alien as, for example, the naturalization provision involved in *United States* v. *Menasche*, 348 U. S. 528, in which Congress had provided that the taking of certain steps by the alien and the maintenance of residence for a certain number of years would eventuate in citizenship. Nothing in the legislative history of the Act nor in the language of the savings clause indicates that any "vested right" with respect to deportation was thought to have accrued to an alien in connection with his commission of an offense.

ARGUMENT

Section 241 (a) (11) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3), requires the deportation of an alien who "*at any time* has been convicted" [emphasis added] of an offense relating to illicit traffic in narcotic drugs, or who "has been convicted" of an offense relating to sale or possession of drugs. Subsection (d) of the same section provides that, except as otherwise specifically provided "in this section", the provisions of the section shall be ap-

plicable "notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the [deportable] classes * * * occurred prior to the date of enactment of this Act."

Respondent was ordered deported under the foregoing provisions by reason of a conviction of an offense relating to illicit traffic in drugs, namely, a conviction of unlawful sale of a quantity of cocaine hydrochloride and of possession and purchase of 385 grains of that drug. He contends, in essence, that since the conviction occurred prior to enactment of the 1952 Act and since Congress had not provided for deportation for that offense prior to the 1952 Act he had a nondeportable status that was preserved by the general savings clause of the 1952 Act, Section 405 (a) (*supra*, pp. 3–4).

The contention is erroneous in two respects. First, the savings clause, by its own terms, does not apply where the 1952 Act has "otherwise specifically provided". In this case, the Act does otherwise provide by the very specific retrospective provisions of subsections (a) (11) and (d) of Section 241. Secondly, even if the savings clause were not thus specifically conditioned, the mere inaction of Congress, prior to 1952, concerning the particular offense committed by respondent created no status, condition, right in process of acquisition, or other thing intended to be preserved by the savings clause.

I

ALIENS CONVICTED OF NARCOTICS OFFENSES PRIOR TO THE ENACTMENT OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 ARE NOW DEPORTABLE UNDER THAT ACT

A. The statutory language shows a clear congressional purpose to render prior narcotics offenses a present basis for deportation.

Section 241 (a) (11) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3), provides that any alien shall be deported—

> who *at any time has been* convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who *has been* convicted of a violation of any law or regulation governing or controlling the taxing, * * * sale, * * * or the possession for the purpose of * * * sale * * * of * * * [drugs] * * *. [Emphasis added.]

Section 241 (d) further provides that—

> Except as otherwise specifically provided *in this section* [Sec. 241], the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), *notwithstanding* * * * *that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.* [Emphasis added.]

Section 241 contains specific exceptions to the retroactive effect of its subsection (d), but none of these apply to the conviction here involved. The exceptions within Section 241 relate to an alien who becomes institutionalized "hereafter" (subsection (a)

(3)); to an alien who "is, or hereafter" is a drug addict (subsection (a) (11)); and to an alien who "hereafter" employs a visa based upon a nominal marriage (subsection (c)).

The language of Section 241 (a) (11) and (d) seems clearly to express a congressional purpose to make prior narcotic offenses a present basis for deportation under the 1952 Act, and therefore to constitute a provision which "otherwise specifically provide[s]" so as to render inoperative the general savings clause of Section 405 (a) (*supra*, pp. 3–4), assuming (what we do not concede) that Section 405 (a) would apply here in the absence of a specific provision otherwise. There is, first of all, the reference in Section 241 (a) (11) to any alien who "*at any time has been* convicted" as to illicit traffic or "*has been* convicted" as to other specific offenses. The use of the perfect tense in these clauses, particularly when contrasted with the use in the very same subsection of the present as well as the perfect tense (in providing for the deportation of an alien who "is, or hereafter at any time after entry has been" an addict), in itself speaks eloquently of the intent to make past convictions for narcotics offenses a basis of deportation.

In addition, there is the reinforcing language of Section 241 (d) that "except as otherwise specifically provided *in this section*" [emphasis added] the grounds for deportation set forth therein shall apply notwithstanding that the factual basis for the deportation pre-dated the 1952 Act. Congress was not inadvertently using language which restricted exceptions

to *this section* while actually meaning the exceptions contained in a general savings clause elsewhere *in the Act.* Had there been no specific exceptions within the section itself, some search elsewhere for the exceptions might be warranted. But when Congress stated that only exceptions "specifically provided in this section" shall prevent deportation for matters that "occurred prior to the date of enactment of this Act", and when such specific exceptions are to be found within the section, the legislative intent is unmistakable. There is no warrant for seeking to countermand this precise language by more general language elsewhere at a distant point in the statute. Cf. *United States* v. *Minker*, 350 U. S. 179, 186, where this Court noted that "when the reference is to a section, that word is employed" and that "[no] justification appears for treating 'Act' in § 235 (a) as meaning 'section.'" Conversely, no justification appears for treating "section" as used in Section 241 (d) as meaning "Act."

Section 241 (d) also demonstrates that, in order to provide a specific exception to a general clause which contains the language "except as otherwise specifically provided", it is not necessary that any particular formula be used, such as "notwithstanding the provisions of Section 241 (d)". As we have just pointed out, exceptions to 241 (d) were made by the simple use of the word "hereafter". Similarly, to create an exception under the "except as otherwise specifically provided" clause of the general savings clause, Section 405 (a), no set formula like "notwithstanding the provisions of Section 405 (a)" is needed. In some instances in the Act, specific exclusion of the

effect of a provision, designating it by its number, may well have been desirable, and there are instances of such drafting in the Act. But any clear expression of congressional intent to render the general savings clause inoperable is sufficient. Section 241 (a) (11) and (d) "otherwise specifically provide[s]" to the full degree of draftsmanship required to take this case out of the general savings clause. No other meaning can reasonably be attributed to the language of Section 241 (d) precisely stating that the deportation provisions of that section shall prevail even though the facts involved "occurred prior to the date of enactment of this Act."

This Court in *United States* v. *Menasche*, 348 U. S. 528, recognized the wide scope to be given the savings clause and held, in essence, that a clear expression of congressional intent is necessary to render it inapplicable. But in its decision in *Shomberg* v. *United States*, 348 U. S. 540, 547–548, decided the same day as *Menasche*, the Court also noted:

> We would be lax in our duty if we did not give recognition also to the congressional purpose to override the savings clause when other considerations were thought more compelling than the preservation of the *status quo*. * * *

The interrelation of these two principles is illustrated by the facts in *Menasche* and *Shomberg*, both of which involved petitions for naturalization.

The question in *Menasche* (348 U. S. 528) was whether an alien who had commenced his five-year period of residence prior to the 1952 Act would now be subject to the new requirement of physical pres-

ence within the United States for at least one-half of the residence period.[4] That new requirement was stated in language that (unlike Section 241 (d), here involved) contained no reference at all to its prospective or retroactive effect. The Government's contention that the savings clause was inapplicable was based on subsection (b) of Section 405[5] which provided that petitions for naturalization theretofore filed which were pending at the time the Act took effect should be determined by prior law. The Government argued that subsection (b) of Section 405 took all petitions for naturalization out of Section

[4] The pertinent text of the provision, Section 316 (a) (66 Stat. 242, 8 U. S. C. 1427 (a)) was:

"Sec. 316. (a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

[5] Subsection 405 (b) is as follows (66 Stat. 280, 8 U. S. C. 1101, Note):

"(b) Except as otherwise specifically provided in title III, any petition for naturalization *heretofore filed* which may be *pending at the time this Act shall take effect* shall be heard and determined in accordance with the requirements of law in effect when such petition was filed." [Emphasis added. The petition in *Menasche* was not "heretofore" filed, but filed subsequent to the effective date of the Act.]

405 (a) and that, since Menasche's petition for naturalization had not been filed and was not pending when the 1952 Act took effect, the prior law did not apply to his case under 405 (b). This Court did not regard the language of Section 405 (b) as sufficiently explicit to warrant the implication that all petitions for naturalization were outside the scope of Section 405 (a).

In *Shomberg* (348 U. S. 540), on the other hand, the Court had before it Section 318 of the 1952 Act (providing for the deferring of consideration of a petition for naturalization pending disposition of deportation proceedings) which, in terms, was to apply notwithstanding the provisions of Section 405 (b). It did not, with any similar specificity, exclude Section 405 (a), the general savings clause, which "embrace[d] rights under pending petitions" (348 U. S. at 545).[6] The Court nevertheless held Section 318 applicable to a petition for naturalization filed before the effective date of the Act, stating that, although Section 405 (a) was not expressly excluded and perhaps should have been by the draftsmen, nevertheless "their intent is plain enough" (348 U. S. at 545).

There is, accordingly, no overriding requirement for

---

[6] Section 318 is as follows (66 Stat. 244, 8 U. S. C. 1429):

"* * * Notwithstanding the provisions of section 405 (b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability, pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act * * *."

express reference to the savings clause, so long as the purpose "is plain enough." It is not necessary, in order to effect a statutory exemption, that the Congress employ any particular "magical passwords" (*Marcello* v. *Bonds*, 349 U. S. at 310). In this case, the statutory language is clearer and more precise, as to its intent to apply to prior convictions, than the terms before the Court in *Shomberg*. That decision is, therefore, controlling here.

Such, indeed, is the implication of this Court's decision in *Marcello* v. *Bonds*, 349 U. S. 302, involving an alien who had been convicted in 1938 of violation of the Marihuana Tax Act, 26 U. S. C. 2591. Subsequent to enactment of the 1952 Act, he was ordered deported under the same provision which is involved here. The Court stated (349 U. S. at 303):

> Section 241 (a) (11) of the 1952 immigration law makes such conviction *at any time* ground for deportation, and § 241 (d) provides that the deportation provisions of § 241 (a) shall apply even though the facts giving rise to the alien's deportability occurred prior to the date of enactment of the 1952 Act. [Emphasis is that of this Court.]

While the decision was directly addressed to issues other than the impact of the savings clause, the assumption that the statute had been properly interpreted as retrospective was implicit in this Court's holding that the statute, when applied retrospectively to a pre-1952 crime, was not an *ex post facto* law (349 U. S. at 314). Had there been any serious doubt of the retrospective nature of the statute, presumably this Court would not have reached the con-

stitutional issue which it decided. The record clearly presented the savings clause question, for it had been squarely raised before the Board of Immigration Appeals,[7] and was specifically presented to this Court in a supplemental petition for a writ of certiorari, embodying extensive argument (No. 145, 1954 Term, Supp. Pet. 7–17).[8] The supplemental petition was denied (348 U. S. 805), but Marcello again brought the issue before this Court in his brief on the merits, conceding that if the Court reached the constitutional *ex post facto* question it would necessarily sustain by implication the retroactive construction of the statute (No. 145, 1954 Term, Pet. Br. 42). In reply, the Government, without addressing itself to any impli-

[7] The extensive disposition of the point by the Board was before this court both in the record (No. 145, 1954 Term, R. 56–57) and in a special appendix to the petition for certiorari (pages XXI–XXII):

> It is also argued by the respondent's counsel that Section 241 (a) (11) of the Immigration and Nationality Act, under which the Service contends the respondent is deportable, cannot be given a retroactive application. *We agree that the savings clause contained in Section 405 (a) of the Immigration and Nationality Act is very broad.* Yet counsel has not cited any specific language in that Section on which they desire to place reliance. Our examination of Section 405 (a) does not disclose any specific provision particularly applicable to the respondent's case, and we believe that *the phrase therein reading, "unless otherwise specifically provided," defeats his claim because Section 241 (d) does, in fact, specifically provide* * * *. [Emphasis added.]

[8] The Government opposed the supplemental petition on the ground that the two lower court decisions principally relied upon in the supplemental petition involved distinguishable statutory language and facts.

cation that would arise from this Court's reaching the *ex post facto* issue, pointed out *inter alia* that Section 241 (d) would not be affected by the savings clause. The *Marcello* decision cannot be brushed aside, as it was by the court below, with the phrase that *Marcello* "is not concerned with the savings clause" (R. 25).[9]

The importance of the *Marcello* decision to the issue presented here was recognized in *Gagliano* v. *Bonds*, 222 F. 2d 958, 959 (C. A. 5), sustaining the deportation of an alien, as here, by reason of conviction of a narcotics violation prior to the 1952 Act. The court rejected the alien's savings clause argu-

[9] *United States ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 759 (C. A. 8), relied upon by the court below in its *Carson* opinion, 228 F. 2d 142, also pending on writ of certiorari, this Term in No. 72, involved a different problem. It was whether under the 1952 Act a narcotics offense was to be considered solely as a narcotics offense or also as an offense involving moral turpitude. Subsection (b) of Section 241 of the Act provides that deportation shall not take place with respect to an offense specified in subsection (a) (4) (*i. e.*, a crime involving moral turpitude) if there has been an unconditional pardon or a recommendation against deportation by the sentencing judge. At the same time, subsection 241 (a) (11) provides that deportation shall take place in the case of a narcotics offender, and the offense under this subsection (11) is *not* designated as an offense for which, under subsection (b), a pardon or recommendation will prevent deportation. The court in *DeLuca*, with frank uncertainty (213 F. 2d at 764–765), adopted the view that the implication from subsection (11) was not sufficiently strong to outweigh the broad language of subsection (b). Congress has since corrected what it deemed to be an erroneous interpretation (see S. Rep. 1997, H. Rep. No. 2546, 84th Cong., 2d Sess.) by adding to Section 241 (b) the specific sentence: "The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a) (11) of this section" (Pub. L. 728, 84th Cong., 2d Sess., Sec. 301 (c)).

ment on the ground that, "Unfortunately for appellant, we think that issue also, whether formally presented and argued or not, was implicitly foreclosed by the Marcello decision, and, hence, is no longer open for decision by this Court." This Court denied certiorari. 350 U. S. 902.

The restrospective nature of the instant deportation provisions of the 1952 Act has also been noted by other courts of appeals in other contexts. In *Wong Kay Suey* v. *Brownell*, 227 F. 2d 41 (C. A. D. C.), certiorari denied, 350 U. S. 969, holding that Section 360 (a), concerning declaratory judgments, was limited by the savings clause, the court (per Edgerton, J.), stated (p. 43): "* * * At several points in the 1952 Act, exceptions to the general principle of the savings clause are so *specifically expressed* as to make § 360 (a) seem, by comparison, to fall short of 'specifically' providing an exception. *For example*, *§ 241 (d)*, 66 Stat. 208, 8 U. S. C. A. § 1251 (d), enacts that 'the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated [as deportable] in subsection (a), notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) occurred prior to the date of enactment of this Act.'". (Emphasis added.) Similarly, in *Pino* v. *Nicolls*, 215 F. 2d 237, 246 (C. A. 1), reversed on other grounds, *sub nom*, *Pino* v. *Landon*, 349 U. S. 901, the court (per Magruder, J.) held that Section 241 (d) "lays to rest any possible doubt" that the deportation grounds set forth in Section 241 (a) were to have a retrospective effect.

The clarity of Section 241 (d) in expressing the congressional purpose is, in itself, a complete answer to the contention that respondent cannot be deported for a crime committed before 1952. Under the 1952 Act, if the intervening record of an alien offender in respondent's circumstances discloses genuine reform, that fact must be proved affirmatively in proceedings provided under other portions of the Act, *e. g.*, the provision for suspension of deportation (Section 244). But the general language of the savings clause cannot be used to erect an absolute bar to his deportation.

B. *The legislative history confirms the congressional purpose to render prior narcotics convictions a present basis for deportation.*

In the face of the clarity of the language of Section 241, and especially that of subsection 241 (d) providing that the alien shall be deported "notwithstanding" that the facts upon which deportation is based occured prior to the enactment of the Act, it is not surprising that no pertinent legislative history has been adduced to indicate any intent of Congress that those who avoided deportation or were not deportable under former statutes should be made immune from deportation under the 1952 Act by its general savings clause. Rather, the legislative history shows a recognition of the retrospective effect of the statute as to deportation.

The definitive early report of the Senate Committee on the Judiciary, prepared pursuant to a resolution to make an investigation of the immigration system (S. Rept. No. 1515, 81st Cong., 2d Sess.), recommended with respect to narcotics offenses (*id.* at 410):

> The subcommittee recommends that the immigration laws contain specific provision for the deportation of aliens who have been convicted of any law pertaining to narcotics. Such aliens should be deportable, whether the conviction occurred prior to or after entry into the United States. The deportable class will include those convicted under any law in this country pertaining to narcotics or under any such law of a foreign country.

The proposal contemplated virtually unlimited coverage of narcotics offenders, irrespective of place of offense, much less of length of time in the past.

The committees of both the Senate and House acknowledged consideration of analyses of drafts of the Act (S. 3455, 81st Cong., 2d Sess., and S. 716, 82d Cong., 1st Sess.) by the Immigration and Naturalization Service (S. Rept. 1137, 82d Cong., 2d Sess. 3; H. Rept. No. 1365, 82d Cong., 2d Sess. 27–28).[10] These analyses contemplated no exception to the retrospective aspect of the instant provisions, whether by the specific wording of the provisions or by the general language of the savings clause. Thus, the analysis of S. 716 says, in pertinent part, only that section 241 (a) (11) "appears to be a much more inclusive ground for deportation of persons who violate the narcotic laws than is contained in existing law" (p. 241–7). The analysis of S. 3455 discloses that the addition of the terms "status", "condition", and "right in process of acquisition" in the savings clause

[10] Copies of these analyses have been lodged with the Librarian of this Court for use in connection with this case and *Lehmann* v. *United States ex rel. Carson* (this Term, No. 72).

(their Section 361) was intended to resolve a conflict of decisions on a minor's derivation of citizenship through parental naturalization.[11] Of Section 241 (d), the analysis of S. 716 says (pp. 241–15, 16):

> This subsection makes aliens who fall within any of the classes enumerated in subsections (a) or (c) deportable without regard to the fact that the alien entered the United States before the enactment of this Act or that the facts which make him deportable occurred before that time. *This of course gives retroactive effect to the deportation provisions of this bill.* [Emphasis added.]

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[11] The analysis, in pertinent part, is as follows (pp. 361–1, 2):

"This section is designed to replace section 347 and the last paragraph of section 504 of the 1940 Act. The section provides certain savings clauses in connection with preserving the validity of documents, liability for civil and criminal proceedings, and other matters set forth in the draft, after the bill takes effect.

"Subsection (a) will replace section 347 (a) of the 1940 Act. The interpretation of the savings clause in section 347 (a) has been the subject of divergent court decisions and an attempt has been made in this draft to clarify the meaning of the provision. The court decisions in question are *U. S. ex rel. Aberasturi* v. *Cain*, 147 F. (2d) 449; and *Bertoldi v. McGrath*, 178 F. (2d) 977. The addition of the words 'status' and 'condition' on line 2, page 241 of the bill is an obvious attempt to overcome the decision in the *Aberasturi* case. The Service believes that the addition of these words is desirable, since the *Aberasturi* decision was contrary to the Service views of the proper interpretation of section 347 (a) of the 1940 Act. The decision in the *Bertoldi* case, however, was in line with the Service viewpoint. It is further recommended that, in addition, there be added following the word 'condition' on line 2, page 241, the words 'right in process of acquisition,'. It is believed that it would also be desirable to add following 'suits' on line 4, page 241, the language 'actions, proceedings, statuses, conditions, rights,'."

See *United States* v. *Menasche*, 348 U. S. 528, 533–535. The matter is further discussed in Point II, *infra*, pp. 25–26.

As pointed out in the Government's brief (pp. 13–16) in the companion case of *Lehmann* v. *United States ex rel. Carson*, No. 72, even with respect to the former five-year limitation on deportation of stowaways, there was explicit recognition in the analyses that the new deportation provisions would operate retrospectively.

In the final Senate committee report on the present legislation, it was specifically stated (S. Rept. No. 1137, 82d Cong., 2d Sess. 22):

> Unless otherwise specifically provided in the bill, an alien will fall within the deportable classes * * * regardless of whether the facts, by reason of which the alien belongs to a deportable class, occurred prior to the enactment of the bill. *Deportation proceedings are not criminal in nature, and, therefore, the ex post facto limitations in the Constitution are not applicable to the retroactive features of the provisions.* [Emphasis added.]

With respect to the savings clause, the report only stated (*id.* at 50): "Section 405 [then 404] contains the savings clauses." The very brevity of such treatment is an indication that this clause was not to have the far-reaching effect now sought to be ascribed to it.

The House committee report contains an illuminating statement of policy (H. Rept. No. 1365, 82d Cong., 2d Sess. 6):

> Although an alien who had acquired residence in this country was entitled to the same protection of life, liberty, and property as a citizen, he acquired no vested right to remain and the Government has power to deport him if, in the

> judgment of Congress, public interests so required, and such power is not dependent upon the existence of statutory conditions as to his right to remain at the time he became a resident. An alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of our Government.

The House report (*id.* at 61) did not summarize the retrospective effect of Section 241 (d) in the manner of the Senate report, *supra*. However, with respect to the savings clause, the committee discussed other aspects of the operation of the clause, stating that the provision was assumed to cover applications for suspension of deportation and for adjustment of status (*id.* at 90). The report evidences no understanding that the clause would in any respect override the express retrospective provisions of Section 241 (d) (*id.* at 90).

Taken as a whole, the legislative history confirms the intent, so clearly indicated by the language of the statute, that convictions for narcotic offenses prior to 1952 constitute a present basis for deportation.

II

THE MERE FAILURE OF CONGRESS PRIOR TO 1952 TO PROVIDE FOR DEPORTATION WITH RESPECT TO A CERTAIN OFFENSE DOES NOT CREATE A "STATUS" OF NONDEPORTABILITY PROTECTED BY SECTION 405 (a) OF THE 1952 ACT

In the foregoing discussion, it has been assumed, for the purpose of argument (see p. 11, *supra*), that the respondent has some form of "status" within the meaning of Section 405 (a). And it has been demon-

strated, we believe, that even upon such assumption the retrospective nature of Section 241 (a) (11), especially when coupled with Section 241 (d), is so specific and emphatic that the savings clause by its own terms (where "otherwise specifically provided" elsewhere in the Act) does not apply. In this portion of the brief, we challenge the validity of the assumption that respondent had some form of "status" within the meaning of Section 405 (a). The Court, of course, need not consider this second issue if it accepts our contention as to the specifically retrospective nature of the deportation ground involved here.

The savings clause, Section 405 (a), provides in pertinent part for the preservation of "any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect." As this Court recognized in *United States* v. *Menasche*, 348 U. S. 528, 533–535, the addition in the 1952 Act of the terms "status", "condition", and "right in process of acquisition" was intended to resolve an inter-circuit conflict of decisions by endorsing the prior holding of *Bertoldi* v. *McGrath*, 178 F. 2d 977 (C. A. D. C.), that a child of a naturalized parent would become a citizen upon five years of residence, irrespective of a later enactment requiring both parents to be naturalized. See *supra*, pp. 21–22. It is, of course, settled that the 1952 extension of Section 405 (a) is not limited to situations concerning derivative citizenship, even though the immediate

reason for the change lay in that area. *United States* v. *Menasche, supra,* at 535. But this legislative history of the 1952 extension of the savings clause is at least indicative of the general type of "status", "condition", and "right in process of acquisition" which Congress intended to be preserved by the added language. In our view, the change was made to protect those aliens who had gone at least part way toward satisfaction of the requirements set forth by Congress with respect to certain privileges relating to immigration and naturalization. In short, in the absence of some affirmative action by Congress extending to such aliens a privilege of this nature, the savings clause has no application. As the Court stated in the *Menasche* case (p. 535): "[t]he change in the section * * * embodies, we believe, congressional acceptance of the principle that the statutory status quo was to continue *even as to rights not fully matured*" (emphasis added). Thus, in the *Menasche* case, involving a specific provision permitting naturalization upon the completion of certain steps and a specified period of residence, it could be said that an alien who had applied for naturalization under this enactment and who had already put in a number of years of residence possesses a "right in process of acquisition".

By contrast, in the instant case, there has been no affirmative extending of a privilege to an alien by Congress, but rather the mere failure of Congress during the earlier time to provide for deportation with respect to certain offenses, including that for which respondent was convicted. Plainly, respondent's pre-1952 crime did not constitute a step toward the acqui-

sition of any right or privilege. His situation is in no way comparable to that affirmatively accorded by Congress in connection with naturalization of a parent (as in *Bertoldi*) or an alien's taking out his first naturalization papers (as in *Menasche*). Both the earlier provisions as to derivative citizenship and as to naturalization provision are very different from a mere failure to make any provision, as here. Such congressional inaction cannot be construed as some kind of general amnesty with respect to past misconduct or as an award of a comparable status. At most, Congress simply did not see fit prior to 1952 to enlarge the scope of the categories of deportable persons to include those in respondent's circumstances. But this Court has repeatedly held that the alien derives nothing from the fact that Congress has not heretofore chosen to attach the consequence of deportation to an alien's previous conduct; Congress can act, and act retroactively, at a later time. *Galvan* v. *Press*, 347 U. S. 522, 531; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 595; *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 529; *Mahler* v. *Eby*, 264 U. S. 32, 39–40; *Ng Fung Ho* v. *White*, 259 U. S. 276, 280; *Marcello* v. *Bonds*, 349 U. S. 302.

In holding that respondent had a status of nondeportability, the court below relied on two decisions. Neither, we believe, is persuasive. In *Lehman* v. *United States ex rel. Carson*, this term, No. 72, the essence of the situation prior to enactment of the 1952 Act was that Carson had illegally entered the United States and been convicted of crimes. For these acts, he could not then be deported, for Congress

had excluded as grounds for deportation an illegal entry undetected for five years and an offense for which a pardon had been granted. As discussed in our brief in No. 72, we think such congressional action did not constitute the affirmative creation of a status within the meaning of the savings clause. Nevertheless, Congress at least came closer to the affirmative grant of a status in the *Carson* situation than here, so that, even if it were concluded that Carson possessed such a status, the decision would not be controlling with respect to the instant case.

United States ex rel. DeLuca v. *O'Rourke*, 213 F. 2d 759 (C. A. 8), the other decision relied upon below (R. 23–24), deals with an offense for which there could formerly be no deportation because of the recommendation against deportation by the sentencing judge. Whatever the validity of the decision (see fn. 9, *supra*, p. 18), the situation is, like *Carson*, *supra*, far removed from the instant one in that at least some affirmative action of Congress may perhaps be found in its specific provision with respect to a judge's recommendation against deportation.[12]

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[12] The court in *DeLuca* also appeared to rely somewhat (213 F. 2d at 764) upon the provision of the savings clause that nothing in the Act should be construed to affect the validity of any "document," or to affect any "act * * * *done or existing*" at the time the new Act took effect. We question the applicability of the quoted language even in *DeLuca*, for the "validity" of no document is being affected when that document (presumably the recommendation against deportation) was always to be effective only so long as the then immigration legislation was effective. In any event, no document is outstanding with respect to the offense below or with respect to the illegal entry in *Carson*.

The legislative history of Section 241, as we have shown (*supra*, pp. 20–24), indicates a controlling purpose to make the provision retrospective. There is no indication that Congress contemplated that any "status" had been acquired by the earlier failure to make an offense a ground for deportation. On the contrary, as already pointed out (*supra*, pp. 23–24), the House committee(H. Rept. No. 1365, 82d Cong., 2d Sess., 6) emphasized that an alien "acquired no vested right to remain and the Government has power to deport him if, in the judgment of Congress, public interests so required, and such power is not dependent upon the existence of statutory conditions as to his right to remain at the time he became a resident." Nothing in the legislative history of the Act nor in the language of the savings clause indicates that any "vested right" with respect to deportation was thought to have accrued to an alien in connection with his commission of an offense. In appropriate and specific clauses, Congress did recognize that an offender may have reformed and that relief in certain cases may be warranted (see p. 20, *supra*). The offender of yesterday was not, however, accorded a status absolving him from liability to deportation.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be reversed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 435

JOHN F. MULCAHEY, District Director, I. N. S.,
Detroit District,

Petitioner

v.

GUISEPPE CATALANOTTE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

LOUIS M. HOPPING,
2256 Penobscot Building,
Detroit, Michigan,
Attorney for the Respondent

SUPREME COURT OF THE UNITED STATES

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GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

The issue before this Court is the correctness in law of the interpretation by the Court of Appeals of Section 405(a), the savings clause, of the Immigration and Nationality Act of 1952. R. 21.

The whole matter is summed up in the penultimate paragraph of the opinion R-24-25, wherein the Court of Appeals says: "We conclude that Catalanotte's status of non-deportability is protected by Section 405 of the Act, since statutory provisions upon which the government relies do not constitute such specific exceptions to Section 405 as are contemplated in that Section in order to make it inapplicable."

If the Court of Appeals is correct in this, the issue is resolved. If the Court is incorrect, then many questions come to mind which seemingly require consideration.

The petitioner attacks the Court of Appeals decision by saying two things. First, the statute it relies upon is sufficiently specific to constitute such "specific exception" to Section 405 as is contemplated in that Section; Secondly, the status of non-deportability found is not a status within the meaning of the savings clause.

Against the first point made by petitioner are the opinions of this Court in *U. S. v. Menasche*, 348 U. S. 528 and *Shomberg* v. *United States*, 348 U.S. 540, expressly followed by the Court of Appeals R. 24. A footnote to the Shomberg case notices the kind of question raised here. *Shomberg* v. *U. S. supra* at page 543.

This Court, analyzing the statute in the Shomberg case, found several instances in which Congress used the phrase, "notwithstanding the provisions of Section 405", thus clearly manifesting the intention to negative the operation of Section 405. Having used such specific language, Congress clearly indicated the kind of specific provision which was intended to and does negative Section 405. If such specific language is not used in any instance, it can only be concluded that Congress intended a different result from that so specifically expressed. The different result here is that Section 405 operates to protect a status (or other kind of situation named in the statute) existing on the effective date of the Act. This Court stated *U. S.* v. *Menasche, supra* at p. 534) "We conclude dthat Congress intended to adopt the principle of the Bertoldi case that "the new act should take effect prospectively". This would apply to deportation as well as naturalization except where specifically stated that Section 405 would not operate.

II.

The Respondent's view of Petitioner's second point is that there is a mistake in Petitioner's major premise. He argues that "mere inaction of Congress" does not create a status. But we are not dealing with a case of mere inaction of Congress.

Respondent's position in the Court of Appeals was that a status of non-deportability of Catalanotee could be made out on several grounds. It does not depend upon mere inaction of Congress but is related to Congressional policies expressed, and such statutes as that of February 18, 1931, 46 Stat. 1171, which expressly provided prospective effect for deportation for narcotic conviction, and in the statutory provision for recommending against deportation by a Court.

Appellant's brief went to some length in the Court of Appeals to point out that deportation within a limited time was provided for in the penalty section of the Narcotics Law, the criminal statute, along with a fine and imprisonment. This fact seemed to support the argument that adding deportation to Catalanotte's punishment in 1952 or lafer, for an offense for which he was convicted and sentenced in 1925 would be a violation of due process of law guaranteed in the Constitution.

If the respondent is protected by the savings clause against retroactive deportation, there is no occasion for the due process of law argument. But if he is not so protected by the statute, he says the due process clause would protect him. The Board of Immigration Appeals, on the other hand, chose to cite ex post facto decisions, and claimed clearance for its action. The respondent took issue to this secondary argument.

The Court of Appeals did not go into the question of how Catalanotte's status of non-deportability was acquired.

The Court said, R. 22, "The record disclosed that appellant, prior to the Act of 1952, had the status of a non-deportable alien." It quotes the finding of the Board of Immigration Appeals to the same effect.

This is not equivalent to saying that the non-deportable status referred to was created by the "mere inaction of Congress", and in the light of this record, the latter would be untenable.

Throughout Catalanotte's defense he has maintained that he is protected by the provision of Section 405, from deportation on the sole ground of conviction in 1925. His early efforts at defense antedated the earliest decisions interpreting section 405. Respondent conceived the strong ground of his argument to be that the alternative to holding Section 405 to be applicable to his case is that section 241(a) would otherwise be unconstitutional, as applied to him. He pointed to the due process clause, since the government had the election at the time of his conviction to proceed under a statute that would have made him deportable for a narcotic conviction in 1925. But since they did not so proceed on the statute to attempt to declare him deportable within the time which that statute provided, there appears to be no differene in principle now than there would be if the government had elected to waive part of the imprisonment or fine, and after 30 years or more had then decided to try to enforce either of them.

Respectfully submitted,

LOUIS M. HOPPING,
Attorney for Respondent.

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No. 435

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v.

GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

LOUIS M. HOPPING,
2256 Penobscot Building,
Detroit, Michigan,
Attorney for Respondent.

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GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

Guiseppe Catalanotte, respondent herein respectfully petitions for a rehearing of the opinion and judgment of this court rendered June 3, 1957.

This court on June 3, 1957, reversed judgments of the Court of Appeals for the Sixth Circuit in this case and a companion case, *Lehmann* v. *United States ex rel. Carson.* The respondent filed his brief on the merits of the case wherein he referred to the two main points raised by the government. Under the first point he relied upon the applicability of the savings clause to the respondent's situation and cited two decisions of this court *U. S.* v. *Menasche*, 348

U. S. 528 and *Shomberg* v. *U. S.* 348 U. S. 540. The opinion of the court in the instant case takes those two prior decisions out of consideration upon the issue here.

Under point two the respondent stated, "If the respondent is protected by the savings clause against retroactive deportation, there is no occasion for the due process of law argument. But, if he is not so protected by the statute he says the due process clause protects him. The Board of Immigration Appeals on the other hand chose to cite ex post facto and claimed clearance for its action."

The court having found that the savings clause affords the respondent no protection, respondent respectfully urges upon the court further consideration of the constitutionality of Section 241 (a)(11) and (d) of the Immigration and Nationality Act of 1952.

It is noted that the court in its opinion states, "At that time there was no statute making that offense a ground for deportation." The statutory provision which made conviction for certain narcotic offenses a ground of deportation was enacted in 1922 and has continued in effect until the present time, with amendments. The Immigration Act of 1917 provided a defense for a person convicted on a narcotics offense if he applied to the sentencing judge within 30 days. If Catalanotte had been charged, as he might have been, under Section C of the amended narcotics statute to which the deportation was specifically attached, he would have had the opportunity to avail himself of the provision for applying to the sentencing court for a recommendation against deportation which, if granted, would have thereafter made him immune to deportation on that charge.

Catalanotte is ordered deported *solely* because of a conviction of a narcotic offense for which he was sentenced in 1925.

The constitutional question, here urged, was not directly presented, for the reason that the language of the savings clause, preserving a status existing on the effective date of the statute, and the judicial decisions heretofore published with reference to this statute, so limited the scope of the inquiry as not to reach the constitutional question until now. *Bugajewitz* v. *Adams supra* at page 591.

This respondent raised the question of his constitutional protection, as a possible and present alternative to protection to him by virtue of the savings clause, before the Board of Immigration Appeals, and throughout his defense. Discussion of this point was not considered within reach because recognition of an effectiveness of the statutory provision, now reversed, made the consideration of a constitutional objection unnecessary.

The constitutional provisions referred to are:

Amendment V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I. Section 9.

"No Bill of Attainder or ex post facto Law shall be passed."

Catalanotte is being held at the present time to answer again for an indictable offense, without a presentment or

indictment of a Grand Jury, for an offense for which he was in 1925 indicted by a grand jury, tried and sentenced.

It is true that the immigration act does not in terms call itself an amendment to the criminal statute under which Catalanotte was indicted and sentenced, but it has that effect. In his brief before the Court of Appeals, appellant said, "This case cannot escape the character of a criminal case", if one looks at the substance instead of the form. Brief C. A. pp. 1819.

The statute under which Catalanotte was indicted and sentenced was originally enacted December 17, 1914. (38 Stat. 785). It was specifically made supplemental to two earlier statutes, the Pure Food and Drug Act of 1906, and the Narcotics Drugs Import and Export Act of 1909, approved February 9, 1909. The latter, which has generally been considered the basis of all federal regulation of narcotic drugs, was amended in 1922 (42 Stat. 596, approved May 26, 1922) to create a Federal Narcotic Control Board, to redefine "narcotic drugs" to include "cocaine" (the only drug with which Catalanotte was charged) and to redefine and punish offenses. In the penalty section of the statute as amended, three forms of punishment are provided, a fine of not more than $5,000.00, imprisonment for not more than ten years, and deportation, in accordance with the provisions of Sections 19 and 20 of the Immigration Act of February 5, 1917, if it so happened that a person convicted under section (c) of the amended act were an alien convicted after entry. But deportation was authorized only "upon the termination of the imprisonment imposed by the court". If the government did proceed to deport such alien, the existing law further gave the alien an additional defense to such deportation in that he could within 30 days of sentence ask the trial court for a recommendation against deportation, and if granted, such deportation would not be made or directed.

The statute of limitations in effect at that time provided that the government had three years from the date of the offense within which to prosecute. Suppose, for the sake of argument, that four years after the date of the offense, Congress had attempted to legislate in substantially these words, "We consider narcotic offenses to be more serious than did the Congress which sat in 1922, and therefore we enact that any person heretofore convicted of a narcotic offense shall be sentenced to an additional fine and imprisonment, and in the case of an alien so convicted, he shall be deported at any time hereafter that the government pleases and regardless of whether he was convicted under Section (c) of said act of 1922 or any other law relating to traffic in narcotic drugs."

Is there much room for doubt that such an enactment would have been stricken down as highly unfair and oppressive. It might have been considered a bill of attainder because it imposed a penalty without a judicial trial. It seems clearly to be ex post facto, because it relates an increased penalty, and a much longer statute of limitation, back to an act that was done and complete before the penalty was imposed. It would be a violation of due process of law because the persons theretofore convicted could have had no notice of a penalty which did not exist in the law at the time of conviction, and because, by the delayed imposition of the penalty by surprise, the convicted persons were deprived of any opportunity to avail themselves of defenses which were offered for a limited time.

Now, it does not seem logical that the essential character of such legislation is different from that just described, where the amending act is not four, but thirty years later, and the history of the original criminal statute is nearly forgotten and lost in antiquity. If it is objected that such is not technically an "amending act" then we should call it an enlarging act, because it has the effect of enlarging a

criminal statute, to increase the penalty, the time within which the penalty may be imposed, and the procedural advantages to the government in imposing the penalty. It diminishes or removes defenses formerly available to a defendant.

It is also noted in the opinion of the court that the court says, "It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved." This clearly means that Congress may provide that convictions for past offenses may be taken into consideration by the immigration authorities in determining future deportability. That this situation raises a question of the application of the ex post facto clause is evident from the number of times that courts have been asked to pass on an ex post facto claim in deportation cases. However, it is earnestly urged upon the court that the situation presented by Catalanotte is much more definitely within the area prohibited to Congress by the Constitution of the United States than any other which has appeared in the discussions of this issue. In this case Congress has not set up any standard of future undesirability based upon any conduct subsequent to the date of the enactment of the deportation statute. It is simply a plain effort in this section of the statute to add the additional penalty of deportation based on the sole fact of the conviction of any narcotics offense at any time in the past. We believe this is forbidden by the Constitution and that acquiescence in this result would go much beyond any decision up to this time.

May we examine again decisions of this court cited in support of the proposition that Congress may legislate retrospectively. We hope to show that this proposition, on the basis of the authorities cited, has limitations far short of those inherent in the present case.

The earliest decision upon which the opinion of the court relies is *Bugajewitz* v. *Adams*, 228 U.S. 585. The petitioner herein respectfully calls attention to the fact that the situation before the court in *Bugajewitz* v. *Adams* was not one involving retroactive effect of a deportation statute. Some remarks in the course of the courts opinion pointed in this direction but a reading of the decision makes it clear that the case does not hold that Congress may pass a retroactive deportation statute nor that the executive department may enforce such a statute within their respective constitutional limitations. Bugajewitz was ordered deported for an act of prostitution. At page 590, the report includes the following statement by Mr. Assistant Attorney General Harr, "The appellant was not arrested for practicing prostitution prior to the statute, but because she was found so engaged after its enactment." This would seem to make it clear that the case of *Bugajewitz* v. *Adams* and the later cases which turned upon its authority are not precedents for upholding retrospective provisions of an immigration law.

In *Bugajewitz* v. *Adams* the court placed some weight on its prior decision of *Johannsen* v. *U. S.*, 225 U.S. 227 which likewise does not hold that Congress has constitutional power to enact a retroactive ground of deportation. The issue in the Johannsen case was whether a naturalization court had power to revoke a naturalization which has been procured by fraud. At page 242 the court says, "The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer." It seems to be undisputed that in the present case the Immigration and Nationality Act of 1952 does impose a new penalty for an act that was performed and was complete, with punishment, many years before the effective date of the Immigration and Nationality Act. It is submitted that by a very clear inference the court in the

Johannsen opinion condemns the kind of statute which has the effect of the Immigration Statute in this case. When the Johannsen decision was considered in the Bugajewitz case, this court again condemned retrospective statutes by inference when it says with respect to Bugajewitz, "It is not necessary to construe the statute as having any retrospective effect."

In the case of *Ng Fung Ho* v. *White*, 259 U.S. 276 it does not involve the enforcement of a retroactive ground of deportation.

In *Galvan* v. *Press*, 347 U.S. 522, the court dealt with communist party membership which was made a ground of deportation against persons whose membership antedated the enactment of the act. This court, however, in dealing with the situation presented in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 and *Galvan* v. *Press*, *supra*, made the point that there was more the appearance than an actuality of retroactive effect inasmuch as the deportation statute was a re-enactment of previous statutes which put the aliens on notice that the conduct for which they were being ordered deported was prohibited under law under penalty of deportation.

In the decision of *Galvan* v. *Press*, the court specifically pointed out the possible application and force of an objection to a retroactive deportation statute on the ground that it violates the due process provisions of the Federal Constitution. This reference by the court seems to be particularly significant in the case of this petitioner. The question of the denial of due process of law and the applicability of the constitutional provisions prohibiting bills of attainder and ex post facto laws were expressly mentioned by Catalanotte in his defense before the Board of Immigration Appeals and were preserved in the District Court wherein he claimed a misapplication of the law. These points were again referred to in his brief before the

Court of Appeals. So long as there was apparent authority of this court to apply the savings clause in favor of Catalanotte, his claim to constitutional protection was set aside and not considered except as an alternative which would become a necessary alternative at any time that the protection of the savings clause would be construed as being unavailable to Catalonette. The decision of the court makes the savings clause unavailable to Catalonette and, therefore, he respectfully requests this court to consider the alternative objection which he has endeavored to preserve throughout various stages of the proceedings.

The petitioner here wishes to recall to the court that at the time of the indictment and conviction of Catalanotte in 1924 and 1925 there was a provision in the penalty section of the statute prohibiting traffic in narcotics for the deportation of any alien convicted under a certain section of that statute. In other words a criminal statute provided three kinds of penalty, a fine, imprisonment, and in the case of an alien, the additional penalty of deportation. The United States Attorney had the option to proceed in such a manner as to deport Catalanotte at the termination of his imprisonment in 1925. He did not elect to do so. By way of argument it may be pointed out that the court on the recommendation of the United States Attorney might have elected to waive either the fine or the imprisonment portion of the penalty. If the government through its authorized representative had waived either the fine or the imprisonment in 1925 and thereafter in 1953 had petitioned the court to add the part of the penalty which had been duly waived in 1925, the alien so proceeded against would have been protected by the due process of law provision of the Constitution. The effort to deport Catalanotte differs from this situation in that Congress has passed a new statute to do what the government's authorized representatives could have done but did not do in 1925.

By referring only to the new statute and not to the old statute, the government seemingly avoided the appearance of adding to a criminal case the third part of the penalty statute which was available to the government in 1925.

There appears to be no difference in principal, should a greater fine or imprisonment be added, from that which exists in the case at bar wherein penalty of deportation is added to the penalties already imposed for the conviction of 1925.

Conclusion

When the savings clause of the Immigration and Nationality Act was rejected as affording no protection to the respondent, the constitutionality of Section 241 as applied to the facts in the respondent's case under Article 1, Section 9 and also amendment 5 of the United States Constitution should be decided. We respectfully urge the court to grant this petition for rehearing so that it may consider whether the application of the statute to the facts of this case are in accord with the provisions of the Constitution and the judicial precedents.

Respectfully submitted,

LOUIS M. HOPPING,
Attorney for Respondent,
2256 Penobscot Building,
Detroit 26, Michigan.

JUNE 12, 1957.

Certification

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

LOUIS M. HOPPING,
Attorney for Respondent.